FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 518

GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SABINE TRANSPORTATION COMPANY, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES I. FRANCIS,
Esperson Bldg.,
Houston, Texas,
Attorney for Respondent

VINSON, ELKINS, WEEMS & FRANCIS,
Houston, Texas,
Of Counsel

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

	PAGE
INTRODUCTION	1
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. What appears to be a conflict between decisions of the Ninth and Fifth Circuits has been resolved	4
II. The question here presented for all practical purposes is now moot	9
III. The decision below is correct	9
IV. The inclusion of the $530,000.00 in Respondent's dividends paid credit does not result in a second credit of the same character, but if it does Congress intended it that way	11
CONCLUSION	14
APPENDIX	15
Revenue Act of 1938, c. 289, 52 Stat. 447	15
Section 13	15
Section 27	15
Treasury Regulations 101	17
Opinion of Circuit Court	18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 518

GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SABINE TRANSPORTATION COMPANY, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Introduction

On November 9, 1942, a petition was filed on behalf of Guy T. Helvering, Commissioner of Internal Revenue, praying that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 30, 1942.

Opinion Below

The memorandum opinion of the Board of Tax Appeals (R. 19-22) is unreported. The opinion of the Circuit Court of Appeals is reported at 128 Federal (2d) 845, and the text will be found in the Appendix at page 18.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 30, 1942. A petition for rehearing was filed by the Commissioner of Internal Revenue on July 18, 1942, and such petition was denied August 13, 1942. The jurisdiction of this Court has been invoked under Section 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925.

Notice of the filing of the petition herein, together with notice that no brief will be filed, copies of petition and transcript of record were served on counsel for respondent on November 16, 1942.

Question Presented

Where a taxpayer declared and paid a dividend in its own notes during the year 1937 and was allowed a dividends paid credit in 1937 for the dividend so declared and paid, is not the taxpayer upon payment of such notes in 1938, by the plain mandate of Section 27(a)(4) of the 1938 Act, entitled to include in its dividends paid credit for 1938 such payments as "amounts used * * * to pay or retire indebtedness of any kind * * *"?

Statutes and Regulations Involved

The statutes and regulations involved will be found in the Appendix, infra, pages 15-17.

Statement

The facts as stipulated (R. 10-19) were adopted by the Board of Tax Appeals as its findings (R. 19). The facts relevant to this proceeding are summarized as follows:

During the year 1937 taxpayer, acting under proper authority of its Board of Directors, declared and paid a dividend amounting to $530,000.00 in its own notes. For undistributed profits tax purposes, in its return for the year 1937 taxpayer claimed and was allowed a dividends paid credit, by reason of such dividend paid, amounting to $530,000.00 (R. 19-21). In 1938 taxpayer paid its note indebtedness in the amount of $530,000.00 which was issued by it in 1937 in payment of the dividend. In its return for the year 1938 taxpayer claimed a dividends paid credit under Section 27(a)(4) of the REVENUE ACT of 1938 for the notes so paid by it in 1938. The Commissioner disallowed the credit claimed for 1938 and was sustained by the Board of Tax Appeals (R. 21-22). The taxpayer appealed and the Circuit Court of Appeals for the Fifth Circuit reversed (R. 36).

Summary of Argument

I.

What appears to be a conflict between decisions of the Ninth and Fifth Circuits has been resolved.

II.

The question here presented for all practical purposes is now moot.

III.

The decision below is correct.

IV.

The inclusion of the $530,000.00 in Respondent's dividends paid credit does not result in a second credit of the same character, but if it does Congress intended it that way.

Argument

I.

What appears to be a conflict between decisions of the Ninth and Fifth Circuits has been resolved.

The Petitioner herein asks this Court to grant his application for writ of error on the grounds that the decision of the Court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in SPOKANE DRY GOODS COMPANY v. COMMISSIONER, reported at 125 Fed. (2d) 865. The decision in the SPOKANE DRY GOODS COMPANY case held that the terms of Subsection (e) of Section 27 of the REVENUE ACT of 1938 controls over the terms of Subsection (a) (4) of Section 27, while the Court below in its decision of the case at bar held that it does not.

The Ninth Circuit decided the SPOKANE DRY GOODS COMPANY case on February 18, 1942. There was pending in this Court on that date HELVERING v. CREDIT ALLIANCE CORPORATION (No. 775, October Term, 1941). Credit Alliance Corporation had liquidated by distributing its assets in kind to its parent corporation, and the question was whether it was entitled to a dividends paid credit for the distribution under Section 27(f) of the REVENUE ACT of 1936. The Commissioner contended that since the liquidating dividend was not taxable to the parent corporation (Section 112(b)(6)), the credit was barred by the provisions of Section 27(h). A comparison of Subsections 27(f) and (h) of the 1936 Act and Subsections (a) (4) and (e) of the REVENUE

ACT of 1938, together with the applicable Regulations, is set forth below:

SUBSECTIONS (f) AND (h), 1936 ACT:

"(f) Distributions in Liquidation.—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid."

SUBSECTIONS (a) (4) AND (e), 1938 ACT:

"(a) Definition in General.—As used in this title with respect to any taxable year the term 'dividends paid credit' means the sum of:

"(4) Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness. As used in this paragraph the term 'indebtedness' means only an indebtedness of the corporation existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by the corporation prior to and in existence at, the close of business on such date. Where the indebtedness is for a principal sum, with interest, no credit shall be allowed under this paragraph for amounts used or set aside to pay such interest."

"(h) Nontaxable Distributions.—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part."

ARTICLE 27 (f), REGULATION 94:

* * *

"On the other hand, certain transactions described in Sections 112 and 115 are treated, for the purposes of the Act, not as distributions

"(e) Dividends in Obligations of the Corporation.—If a dividend is paid in obligations of the corporation, the amount with respect thereto which shall be used in computing the basic surtax credit shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. If the fair market value of any such dividend paid in any taxable year of the corporation beginning after December 31, 1935, is lower than the face value, then when the obligation is redeemed by the corporation in a taxable year of the corporation beginning after December 31, 1937, the excess of the amount for which redeemed over the fair market value at the time of the dividend payment (to the extent not allowable as a deduction in computing net income for any taxable year) shall be treated as a dividend paid in the taxable year in which the redemption occurs."

ARTICLE 27 (a)-3, REGULATION 101:

* * *

"Double credits are not permitted, either for the same year or for separate years. Thus, amounts which have been or may be properly

to the shareholders of earnings or profits, but as transfers of such earnings or profits intact to another corporation in whose hands such earnings or profits, being available for distribution by it as dividends to its shareholders, have essentially the same status for the purposes of the Act as earnings or profits derived from its own operations. Characteristic of these transactions is the circumstance that the gain or loss realized from the receipt by the shareholders of property is not recognized by the Act. No dividends paid credit is allowable with respect to such transactions."

taken as a credit pursuant to Section 27 (e) of the Act or Section 27 (d) of the Revenue Act of 1936 (both sections relating to dividends in obligations of the corporation) may not again be included in the dividends paid credit under Section 27 (a) (4) when the obligations are paid. No credit may be allowed under Section 27 (a) (4) for amounts used or irrevocably set aside to pay or retire indebtedness which represents an item which is allowable as a deduction from gross income, either for the same year or a different year. Thus the aggregate of the credits allowable under Section 27 (a) (4) for amounts used or irrevocably set aside to pay or to retire obligations issued at a discount may not exceed the issue price of such obligations."

MR. JUSTICE ROBERTS, speaking for the Court in the CREDIT ALLIANCE CORPORATION case, said that it was not at liberty to disregard the direct and unambiguous language of Subsection (f); that the Regulation was not only contradictory to the plain terms of the subsection, but tends to add a supplementary legislative provision which could only have been enacted by Congress; and that the Court below was right in refusing to give effect to the Regulation.

The same thing is true here. The language of Section 27 (a) (4) is plain and unambiguous. It requires the inclusion in the dividends paid credit of *amounts used or irrevocably*

set aside to pay or retire indebtedness of any kind. The Regulation which the petitioner seeks to invoke contravenes the plain mandate of the statute and it too is, therefore, legislative in character rather than interpretative.

The Court below thought that there was a direct parallel between the situation involved in the present case and the CREDIT ALLIANCE CORPORATION case. After pointing out that the construction of a statute to make it carry out the intent its words import is one thing and that a construction which brings it nearer to what the administrator or court thinks Congress intended or ought to have intended is quite another, the Court said:

> "However, we need not further labor the point here, for in Helvering v. Credit Alliance Association, April 27, 1942, — U.S. —, the Supreme Court, rejecting the same kind of reasoning as to a dividends paid credit claimed under Section 27(b) of the Revenue Act of 1936 and declaring invalid a regulation which contravened the plain terms of the statute, has set the matter at rest."

Since the decision by the Ninth Circuit in the SPOKANE DRY GOODS COMPANY case was entered before this Court decided the CREDIT ALLIANCE CORPORATION case and since the reasoning and the statutory construction applied in the SPOKANE DRY GOODS COMPANY case appear to be contrary to the reasoning and rules of statutory construction applied by this Court in its CREDIT ALLIANCE CORPORATION case decision, the decision of the Ninth Circuit in the SPOKANE DRY GOODS COMPANY case has been in effect overruled by this Court and therefore no conflict now exists between the Circuit Courts on the question raised in the petition for writ of certiorari.

II.

The question here presented for all practical purposes is now moot.

Petitioner herein properly states that the issue which is the subject of his application can not arise in the future. The issue can arise only with respect to corporations with taxable years beginning between January 1, 1938, and December 1, 1939, by reason of the fact that the REVENUE ACT of 1940 and subsequent Acts do not contain sections providing a dividends paid credit for the ordinary corporate taxpayer. The probability of the question arising even in 1939 is further reduced by the fact that the issue here involved can arise only with respect to dividend obligations that were outstanding on December 31, 1937. There are only a few cases pending in which the question is involved. (Page 5 of Petition.) Thus it is apparent that petitioner is asking this Court to expend its labors to decide a question that is of but little importance or public concern and one that is for all practical purposes now moot. If this Court should undertake to pass on the question presented by the petition, all that it would decide would be whether or not the taxpayers in the comparatively few pending cases owe the tax.

III.

The decision below is correct.

The petitioner herein urges that the terms of Subsection (e) of Section 27 of the Revenue Act of 1938 limit or control over the terms of Subsection (a) (4) of Section 27. The court below held otherwise.

Subsection (a) of Section 27 enumerates the items, the sum

of which constitutes the dividends paid credit. They are in so far as this issue is concerned:

> "(1) The basic surtax credit * * * (which, in so far as it applies to the question with which we are here concerned, means dividends paid during the taxable year).
>
> * * *
>
> "(4) Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind * * * ." (Material in parentheses supplied.)

These provisions of Section 27 are not alternates, but are cumulative. That is, they are component parts of a whole, the sum of which goes to make up the dividends paid credit.

Subsection (e) of Section 27 contains two sentences. The first sentence specifies the extent to which a dividend paid in obligations of a corporation on or after January 1, 1938, the effective date of Section 27 of the 1938 Act, shall be treated as a dividend paid and, therefore, the extent to which such a dividend is includible under Subsection (a) (1) of Section 27. We are not here concerned with the provisions of this sentence, because respondent paid no dividend on or after January 1, 1938, in its notes. The second sentence provides that if a corporation paid a dividend in a taxable year beginning between December 31, 1935, and January 1, 1938, in its obligations which had a fair market value at the date of issue of less than the amount for which they were ultimately redeemed in a taxable year beginning on or after January 1, 1938, then such excess (the amount paid in redemption of the obligations over their fair market value on the date issued) "shall be treated as a dividend paid in the taxable year in which the redemption occurs." The function of said sentence was to classify the excess as a dividend and thus make it includible as "dividends paid" under Subsection (a) (1) of Section 27, and there is no

relation between it and the provisions of Subsection (a) (4) of Section 27.

Subsection (e) of Section 27, therefore, treats only of the extent to which certain amounts are to be included in the dividends paid credit as dividends paid, and dividends paid are includible in the dividends paid credit only under Subsection (a) (1) of Section 27. Subsection (a) (4) of Section 27 treats of what is includible in the dividends paid credit for the payment of indebtedness, and that is "indebtedness of any kind." The terms of Subsection (e) of Section 27, therefore, do not operate to limit or control over the terms of Subsection (a) (4) of Section 27, but operate only to broaden what was includible in the dividends paid credit under Subsection (a) (1) of Section 27. Obviously, therefore, the decision below holding that the terms of Subsection (e) do not control over or limit the terms of Subsection (a) (4) is correct.

IV.

The inclusion of the $530,000.00 in Respondent's dividends paid credit does not result in a second credit of the same character, but if it does Congress intended it that way.

The petitioner points out that the court below allowed a second credit in 1938 on account of an obligation which had already been the subject of a full credit for the previous year at the time of its issuance and that this extraordinary result alone might have suggested the view of Congressional intent adopted in the Regulation.

It is true that respondent received a credit when the notes were issued in payment of the dividend and under the decision of the court below also receives a credit on account of the payment of the obligation in 1938. However, said credits were

not against the same thing. The credit received when the obligations were issued was against income. The credit received in 1938 when the obligations were paid was against tax. The earlier credit was for dividends paid. The later credit was for debts paid. The credits provided for were with respect to separate and distinct schemes of taxation. The credit under the 1936 Act could be sufficient to eliminate the undistributed profits tax entirely. The purpose of the credit was to encourage the distribution of dividends and thus increase the amount of tax that would be paid by corporate stockholders. The undistributed profits tax was eliminated by the Revenue Act of 1938 and a flat rate of tax on the income of corporations was imposed. Congress, however, not only retained the dividends paid credit provisions of the 1936 Act in the 1938 Act, but broadened their scope. It evidently thought it wise to continue to encourage corporations to distribute their earnings in the form of dividends.

The credit, however, under the 1938 Act, was not against income as was the credit under the 1936 Act, but it was a direct credit against tax. The credit was 2½% of the dividends paid credit provided in Section 27. The debt credit provision, Section 27 (a) (4), was new in the 1938 Act. The purpose of this provision was to give relief to corporations by way of a dividends paid credit for amounts paid in retirement of indebtedness and thus made unavailable for the payment of dividends. Bearing this purpose in mind, it would make no difference how the indebtedness arose. This accounts for the words "any kind" used after the word "indebtedness" in Section 27 (a) (4). It would seem that in view of this broad language it was the intention of Congress that there should be included in the dividends paid credit amounts paid on indebtedness irrespective of how the indebtedness arose or whether the taxpayer received any tax benefit from it when created.

Such view is borne out by the decision of the Board of Tax

Appeals in the case of PACIFIC FLUSH TANK COMPANY v. COMMISSIONER, 45 B.T.A. 869. The facts in that case were that the taxpayer paid a bonus in 1937 in 4% notes and claimed the amount thereof as a business expense deduction in its 1937 return and the deduction was allowed. The notes were paid in full in 1938 and the payment was included in computing the taxpayer's dividends paid credit under Section 27 (a) (4).

The Board held that the language of Section 27 (a) (4) was unambiguous, required no interpretation and that even though the taxpayer had obtained the benefit of the deduction in its 1937 return there was no legal justification for denying the debt paid credit when the notes were paid. This decision, in effect, overrules the Board's decision in the present case. Although the Commissioner filed a petition for review of the decision in the PACIFIC FLUSH TANK COMPANY case the proceeding was later docketed and dismissed. (PRENTICE-HALL 1942 par. 61085.) Consequently, it must be assumed that the Commissioner now agrees with the decision in the PACIFIC FLUSH TANK COMPANY case.

Had respondent in 1937 given notes amounting to $530,000.00 to its creditors for materials, etc., and used the cash funds to pay the $530,000.00 dividend in cash and in 1938 paid the notes amounting to $530,000.00, no question with respect to a double credit could have been raised. Yet respondent would have been in exactly the same financial condition and would have received exactly the same dividends paid credit that has been allowed by the court, i.e., a credit in 1937 for the payment of a dividend and a credit in 1938 for the payment of indebtedness. Since the credit in 1937 is for the payment of a dividend and the credit in 1938 is expressly allowed by Section 27 (a) (4) for the payment of indebtedness, the credits are of an entirely different character and for a different purpose and in reality the double credit or deduction question, as known to tax law, is not present.

Conclusion

It is respectfully submitted that the petition should be denied.

Chas I Francis

CHARLES I. FRANCIS,
Attorney for Respondent,
SABINE TRANSPORTATION
COMPANY, INC.

Appendix

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 13. TAX ON CORPORATIONS IN GENERAL.

(a) ADJUSTED NET INCOME.—For the purposes of this title the term "adjusted net income" means the net income minus the credit provided in section 26 (a), relating to interest on certain obligations of the United States and Government corporations.

(b) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation the net income of which is more than $25,000 (except a corporation subject to the tax imposed by section 14, section 231 (a), Supplement G, or Supplement Q) a tax computed under subsection (c) of this section or a tax computed under subsection (d) of this section, whichever tax is the lesser.

(c) GENERAL RULE.—The tax computed under this subsection shall be as follows:

(1) A tentative tax shall first be computed equal to 19 per centum of the adjusted net income.

(2) The tax shall be the tentative tax reduced by the sum of—

(A) 16½ per centum of the credit for dividends received provided in section 26 (b); and

(B) 2½ per centum of the dividends paid credit provided in section 27, but not to exceed 2½ per centum of the adjusted net income.

* * *

SEC. 27. CORPORATION DIVIDENDS PAID CREDIT.

(a) DEFINITION IN GENERAL.—As used in this title with respect to any taxable year the term "dividends paid credit" means the sum of:

(1) The basic surtax credit for such year, computed as provided in subsection (b);

* * *

(4) Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness. As used in this paragraph the term "indebtedness" means only an indebtedness of the corporation existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by the corporation prior to, and in existence at, the close of business on such date. Where the indebtedness is for a principal sum, with interest, no credit shall be allowed under this paragraph for amounts used or set aside to pay such interest.

(b) BASIC SURTAX CREDIT.—As used in this title the term "basic surtax credit" means the sum of:

(1) The dividends paid during the taxable year, increased by the consent dividends credit provided in section 28, and reduced by the amount of the credit provided in section 26 (a), relating to interest on certain obligations of the United States and Government corporations;

* * *

(e) DIVIDENDS IN OBLIGATIONS OF THE CORPORATION.—If a dividend is paid in obligations of the corporation, the amount with respect thereto which shall be used in computing the basic surtax credit shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. If the fair market value of any such dividend paid in any taxable year of the corporation beginning after December 31, 1935, is lower than the face value, then when the obligation is redeemed by the corporation in a taxable year of the corporation beginning after December 31, 1937, the excess of the amount for which redeemed over the fair market value at the time of the dividend payment (to the extent not allowable as a deduction in computing net income for any

taxable year) shall be treated as a dividend paid in the taxable year in which the redemption occurs.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 27 (a)-3. Amounts used or irrevocably set aside to pay or to retire indebtedness.—(a) Indebtedness.—

* * *

Double credits are not permitted, either for the same year or for separate years. Thus, amounts which have been or may be properly taken as a credit pursuant to Section 27(e) of the Act or Section 27(d) of the Revenue Act of 1936 (both sections relating to dividends in obligations of the corporation) may not again be included in the dividends paid credit under Section 27(a)(4) when the obligations are paid. No credit may be allowed under Section 27(a)(4) for amounts used or irrevocably set aside to pay or retire indebtedness which represents an item which is allowable as a deduction from gross income, either for the same year or a different year. Thus the aggregate of the credits allowable under Section 27(a)(4) for amounts used or irrevocably set aside to pay or to retire obligations issued at a discount may not exceed the issue price of such obligations.

Opinion of the Court

Filed June 30, 1942

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10077

SABINE TRANSPORTATION COMPANY, INC., *Petitioner*
versus
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition for Review of Decision of the United States Board of Tax Appeals (District of Texas)

June 30, 1942

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

HUTCHESON, Circuit Judge: Submitted upon stipulation as to the facts,[1] the Board, following its decision in Spokane

[1] In 1937, taxpayer, a Delaware Corporation having two stockholders, Pure Oil Corporation and Sabine Towing Company, Inc., declared and paid on its outstanding common stock, cash dividends of $30,000, and a further dividend of $530,000 by the issuance and delivery of its 10 year 8% notes. In its federal income and excess profits tax return for 1937 the petitioner reported the cash dividends and the dividends paid in its obligations, and they were allowed as dividends paid credits.* During the tax year, 1938, the year involved in this proceeding, the 10 year dividend notes were paid to its stockholders in cash and in its return for 1938, taxpayer reported these distributions to stockholders and claimed a dividends paid credit, under Sec. 27(a)(4), Revenue Act of 1938, on account of the sums used to pay and retire them. Respondent disallowed the claim and taxpayer brought the matter to the Board.

*Section 27 of Revenue Act of 1936:

Dry Goods Co. v. Commissioner,[2] sustained the determination of the Commissioner that in computing its income tax for the taxable year 1938, the taxpayer was not entitled under 27(a)(4),[3] to take a dividends paid credit for the $530,000 used to pay or retire the notes issued in 1937 as dividends paid on its obligation.

Taxpayer is here insisting, that by the plain mandate of the section it is entitled to the credit claimed and that both this and the Spokane case were wrongly decided. The Commissioner, standing on the Spokane Case and on the regulation that case approved, insists that the order of the Board was

---

Sec. 27. Corporation Credit for Dividends Paid.

(a) Dividends Paid Credit in General.—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year. * * *

(d) Dividends in Obligations of the Corporation.—If a dividend is paid in obligations of the corporation, the amount of the dividends paid credit with respect thereto shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. * * *

[2] 43 B. T. A. 793, Affd., 125 F. (2d) 865.

[3] Sec. 27. Corporation Dividends Paid Credit:

"(a) Definition in General. As used in this title with respect to any taxable year the term 'dividends paid credit' means the sum of: (1) * * * (2) * * * (3) * * * and (4) 'Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness.' As used in this paragraph the term 'Indebtedness' means only an indebtedness of the corporation existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by the corporation prior to and in existence at the close of business on such date. Where the indebtedness is for a principal sum, with interest no credit shall be allowed under this paragraph for amounts used or set aside to pay such interest."

right and must be affirmed. We do not think so. We think it clear; that the Spokane Case was wrongly decided by Board and court; that the dissenting opinion of Board member Hill, clearly and correctly stated the law of that case; and that in the Pacific Flush Tank Case,[4] the Board while in terms differentiating, in effect overruled its prior decision. We agree with what it there said. "The terms of the statute as applicable to the facts of this case, are so plain and unambiguous as to require in our opinion no resort to construction in order to ascertain its meaning. However, if it could be said that the application of the literal meaning of the statute leads to results which should be avoided, that is, the granting of a double tax benefit, and that this statute should be construed in the light of the purpose and intent of Congress in enacting same, we nevertheless * * * conclude that even if the allowance of the credit claimed here would result in duplicating in whole or in part a tax benefit to the petitioner, it nevertheless appears clear that Congress intended to and did expressly grant such credit. And we further conclude that Art. 27(a)(3) of Regulations 101, purporting to deny such credit is contrary to the statute and is therefore a nullity as applied to the facts of this case."

We think it clear that in attempting, by speculating as to what Congress intended to do except as that intent was expressed in the statute, to rationalize out of the section the comprehensive words which specifically grant the deduction, the Commissioner is attempting to have us arrogate to ourselves the function of rewording rather than of construing and applying the statute.[5] The construction of a statute to make it carry out the intent its words import is one thing. The construction of it to bring it nearer to the thought of administrator or court, or of some particular section of public opinion, as to what Congress intended or ought to have in-

[4] Pacific Flush Tank Co. v. Commissioner, 45 B. T. A. 69.

[5] "Courts and Administrative agencies are bound to enforce the plain words of the statute although there may be reason to think in view of the general legislative purpose that some other provision would have met with favor, if the legislature had called it to mind." Commissioner of Internal Revenue v. Windrow, 89 F. (2d) 69, 110 A.L.R. 1251.

tended, or that the law would better serve its purpose if it were drawn that way,[6] is quite another. However, we need not further labor the point here, for in *Helvering v. Credit Allowance Association*, April 27, 1942, — U.S. —, the Supreme Court, rejecting the same kind of reasoning as to a dividends paid credit claimed under Section 27(b) of the Revenue Act of 1936, and declaring invalid a regulation which contravened the plain terms of the statute, has set the matter at rest. Definitely reaffirming the principle that it is for the courts not to write but to enforce a statute, the court said: "But we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived from the policy disclosed by the subsequent amendment. We shall not burden this opinion by extended reference to the legislative history of the Act of 1936. It is enough to say that it is inconclusive and, to some extent, supports the arguments of both parties. But what-

[6] "A legislative act in the United States is not as in some countries, a mere general outline by a party or group in power, of the purposes it wishes to accomplish, to be expanded, implemented and given effect by its administrators in accordance with the general purposes of its proponents. A fundamental fact in American political life has always been that in the struggle here for laws as means, to make law as liberator effective, there have always been differing opinions, as to the wisdom, propriety and scope of proposed new and controversial laws. Laws as finally enacted here, are usually the result of a compromise, or at least of an adjustment of these conflicting views.

"Because this is and always has been so, it can be usually said of our laws, that the general, not the partial or partisan will, speaks in them. It is because this is so, that canons of statutory interpretation and construction require that statutes must be construed and given effect, in accordance with the language chosen for the expression, of this compromise and adjustment of views, and not in accordance with the purposes or views, of either the proponents or the opponents of the legislation, which have not been given expression in the statute." Fleming v. Belo, 121 F. (2d) at 212-13, Aff'd. June 9, 1942, — U.S. —.

ever may be said of the policy behind the statute's provisions, we are not at liberty to disregard the direct and unambiguous language of Subsection (f)." The principle there announced has controlling force here. Congress, for reasons of its own, in working out a compromise or adjustment, of the very controversial questions raised by the policy of, in effect, taxing corporations on dividends unpaid and of allowing them credits on those paid or what was regarded as the equivalent, drew the dividends paid statutes in the terms in which we find them. The taxpayer, conforming to the statute, paid dividends in its obligations in 1937. Still conforming to the statute it paid these obligations in 1938 and claimed the dividends credit the statute allowed, for the payment or retirement of "indebtedness of any kind." It is not for the commissioner or the courts to deny the taxpayer the deduction that Congress has granted him. The order is reversed and the cause is remanded for further and not inconsistent proceedings.

Reversed and remanded.